IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 457 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AYUBKHAN IBRAHIMKHAN PATHAN & ORS.

Versus

STATE OFGUJRAT

Appearance:

MR AD SHAH for appellants

MR IM PANDYA, ld. APP for Respondent

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE D.P.BUCH

Date of decision: 03/06/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

The appellants - original accused nos.1 to 3, 8 and 10 along with other seven accused, in all, 12 in number, were tried for committing murder of Khalid Gulamkadar Hadafa of Upleta, in Sessions Case No. 134 of 1992. At the end of the trial, the learned Addl. Sessions Judge, Gondal, by his judgment and order dated 29th March 1995, convicted the appellants for the offence punishable under Section 302 read with Section 149 of IPC and sentenced them to suffer RI for life and to pay a fine of Rs.2,000/- each and in default to further undergo RI for one year. The appellants were, however, acquitted of the offences punishable under Sections 109, 153-A and 120-B of IPC.

Accused nos.4, 5, 6, 7 and 9 were acquitted of the offences punishable under Sections 302, 147, 148, 149, 109, 153-A and 120-B of IPC and accused Nos. 11 and 12 were acquitted of the above offences in addition to Section 143 of IPC. It may be stated that against the order of acquittal of these persons, no appeal has been preferred by the State of Gujarat.

2. The facts giving rise to this appeal may be summarised as under:

The informant, Iqbal Haji Habib Fulwala lodged a complaint on 11.4.1992 at about 8.00 p.m. before the Upleta Police Station, stating therein inter-alia that, on 21st March 1992, murder of Haji Ismail Qureshi Fulwala was committed in Jikariya Masjid Chowk wherein the informant was shown as accused who was arrested and later on released on bail. The cause of murder, according to the informant, was that one Hafis of Tablik sect entered into Jikariya Masjid during Ramzan month, who was driven out by Sunni Muslims. A condolence meeting was held at 9.00 p.m. on 8.4.1992 in Hajiyani Dadima Haveli to mourn the death. In the said meeting, provocative speech was made to create feeling of hatred against the other group and processions were also taken out after the meeting. Because of the provocative speech, persons belonging to Tablik sect were waiting for an opportunity to commit murder.

According to the informant, on 11.8.1992 at about 6.00 p.m. he had gone to purchase bread from the shop at Panchhatadi Chowk. At that time, Matin Majid Hadafa PW-19 was standing near the shop of his uncle deceased Khalid Gulamkadar Hadafa and two cars came from Juma Masjid side. Ten to 11 persons came out of the cars and went towards the office of Memon Baitulmal Committee.

According to him, accused nos.1 and 2 were having knives and he is not sure about the weapons possessed by the other persons. Everybody gave indiscriminate blows to the deceased. It is alleged that because of provocative speech of Maulana Abdul Sattar Amdani to commit murder of the persons of Tablik community and since Khalid Gulam Kadar was of Tablik community, he was assaulted. Because of fear, the informant ran away from the place immediately after assault, where he was standing. Later on, he has come to know that Khalid Gulam Kadar succumbed to injuries.

Mr.Jadeja, Circle Police Inspector, Dhoraji recorded the complaint and handed over the investigation to PSI Kuldip Singh of Upleta Police Station, who recorded the statements of witnesses. He has drawn the inquest panchnama and send the dead body for post mortem. The investigation was later on taken over by Mr.Dayalal Joshi, PSI, LCB. After collecting sufficient material against the accused, he arrested the accused and submitted the charge sheet before the learned JMFC, Upleta who committed the case to the Court of Sessions for trial.

The charge Exh.1 was framed against all the accused. The accused denied the charges and claimed to be tried. The defence of the accused was of total denial. After considering oral as well as documentary evidence, the learned trial Judge, as stated above, convicted the five accused out of twelve. Hence, this appeal.

3. Learned Counsel Mr.A.D.Shah appearing for the appellants, after having taken us through the entire evidence on record, submits that the entire prosecution case is based on the evidence of two eye witnesses, Iqbal Haji Habib, PW-15/Exh.59 and Matin Majid Hadafa, PW-19/Exh.83. In the submission of learned Counsel, their evidence is not reliable inasmuch as their presence at the time of incident is unnatural. He further submits that both the said witnesses are inimical to the accused and therefore, they are interested witnesses inasmuch as they are relatives of the deceased and belong to the Tablik community. Learned Counsel submits that since the trial Court has not accepted the evidence against accused nos.4, 5, 6, 7, 9, 11 and 12, the evidence of other witnesses is required to be rejected and in any case, no conviction can be based relying upon their evidence. Learned APP Mr.Pandya, however, supported the reasoning and the ultimate conclusion reached by the trial Court in toto.

4. Before we discuss the ocular evidence, we may like to point out that the defence has not seriously challenged the medical evidence of Dr.K.B.Solanki, Medical Officer, Upleta, Exh.44, who performed the post mortem of deceased Khalid Gulam Kadar and the post mortem report. There are in all 25 injuries on the person of the deceased. The injuries are on head, right hand, left hand, lower limb, stomach, kidney, chest etc. It is also clear that except the injury no.1, the other injuries are simple injuries. From the post mortem report, we find that seven injuries are on both hands, eight injuries are on left waist, three injuries are on head, face and neck, and four injuries are on abdomen. According to Doctor Solanki, the cause of death is hemorrhage shock due to vital organ injury with associated other multiple injuries which are possible with muddmal knives. From the medical evidence on record, there is no manner of doubt that the deceased died a homicidal death.

5. The question then arises for our consideration is whether the appellants can be held guilty of committing murder of the deceased. In other words, is there sufficient evidence on record for convicting the appellants for committing the murder of Khalid Gulam Kadar. As stated above, the prosecution has strongly placed reliance on the evidence of the two eye witnesses, namely, Iqbal Haji Habib and Matin Majid Hadafa; Except the evidence of these two witnesses, the other two alleged eye witnesses, namely, Siddiq Ismail, PW-2/Exh.40 and Nasir Ajidbhai, PW-3/Exh.41 have turned hostile by not supporting the prosecution. Likewise, two panchas to the inquest panchnama, namely, Naranbhai Ramabhai, PW-5/Exh.46 and Jitendra Dhanabhai, PW-6/Exh.47 have not supported the prosecution case and were declared hostile. The other panchas, namely, Ashokbhai Bhikhabhai, PW-7/Exh.48 and Narankumar Keshavlal, PW-8/Exh.49 to the panchnama of the scene of offence have also not supported the prosecution. Similarly, Kantilal Savjibhai, PW-9/Exh.50 and Dhirubhai Bachubhai, PW-16/Exh.63, panchas to the report about photographs of food-print were declared hostile. Bhupatrai Gusabhai, PW-13/Exh.56 and Bhupatbhai Ramjibhai, PW-17/Exh.66, both panch witnesses to panchnama of the arrest of the accused nos.6, 7, 9, 4, 2, 5, 10, 8 and 1 have not supported the prosecution and therefore, the prosecution was constrained to treat them hostile. Lastly, Hareshkumar Gordhanlal, PW-14/Exh.57 panch to discovery of knife by accused no.1 has not supported the prosecution and was declared hostile. Therefore, the said panchnama was proved by other panch, namely, Dhirajlal Damjibhai,

PW-18/Exh.80.

For the purpose of proving the motive, the PWs have not supported the prosecution, namely, Jikar Hussein, PW-11/Exh.52 and Majid Valibhai, PW-12/Exh.54 amd were constrained to declare them hostile. In substance, except the evidence of informant, Iqbal Haji Habib and Matin Majid Hadafa, no PWs except police witnesses have supported the prosecution. Conviction can be based on the oral testimony of these witnesses provided their evidence is natural, trustworthy and acceptable. Let us, therefore, consider their evidence.

6. Iqbal Haji Habib, PW-15/Exh.59 who is the informant in the present case, had gone to purchase bread at 6.30 p.m. According to him, deceased Khalid Gulam Kadar Hadafa was sitting in his office and Matin Majid Hadafa was standing outside the office. While standing there, he saw two cars coming from the Juma Masjid side, 10-11 persons came out of the cars. He identified accused nos.8, 1, 10, 3 and 2. According to him, he recognises five to six persons. Accused nos.1, 2 and 3 were having knives. Accused no.1 entered into the office of Khalid Gulam Kadar Hadafa first in point of time and inflicted the first blow with knife. The others followed him and started giving indiscriminate blows. He remembers the talk he had with him by Matin on the previous day that when the condolence meeting was held on 8.4.1992 to mourn the death of Haji Fulwala where provocative speech was delivered by Sattar Hamdani by taking revenge to Hajibhai. Therefore, with a view to save his own skin, he ran towards Chowk Fali and stood there by hiding himself for about half an hour. When the crowd was disbursed, he came to know from the talks that Khalid was done to death and therefore, he went to the house of Matin and suggested to file the complaint. He accordingly filed the complaint. In the cross examination, he has admitted that he is one of the accused of murder of Haji Fulwala and that along with Majid Gulam, Haji Rafik, Altaf Fulara and Akil Iqbal are also accused in the said case and all of them have been released on bail. Altaf and Akil are his sons. He used to go to the office of the deceased, where one Mehtaji (Accountant) and a boy used to sit.

On plain reading of the evidence of this witness, one would be tempted to accept the same, however, on close scrutiny of his evidence, we find it difficult to accept it. One has to bear in mind the fact that he is a highly interested witness inasmuch as he and his two sons are involved as accused in a murder case where one Haji

Fulwala, belonging to Bin Tablik Sect having taken place few days before the present incident and is released on bail. Besides, his presence at the time of the incident is unnatural. We have seen the map of the scene of offence. In the cross examination, he has stated that he had gone to purchase bread from Shalimar Bakery. The Map Exh.38 shows that Shalimar Bakery situates in the same line of the office where deceased Khalid was done to death. In that event, he could not have seen the incident. From the discription given by this witness about location even assuming that just opposite the Shalimar Bakery, there is one more bakery where he had gone for the purpose of purchasing bread, in that event, possibly he could have witnessed the incident. In the cross examination, he has admitted that after reaching the bakery, after about 10-12 minutes, two cars came there carrying all accused. No explanation is forthcoming for his wait at the bakery for such a long time. There was no reason for him to wait there for 10-12 minutes after purchasing bread. As per his own evidence, when the two cars came and halted in front the bakery all the persons boarded therein came out from the left side doors. If the cars came from Panch Hatdi Chowk which is from south to north, the left side of the cars would face the bakery where he was standing, in that event, he would have seen all the accused and vice versa. It has not come on record as to why the deceased was made a target by the accused? Accepting the case of the prosecution that Khalid belonged to the opposite party and therefore he was killed for the purpose of taking revenge for the murder of Haji. Applying the same reasoning, this witness could have been the first target of the accused. He couls not have been spared by the accused. Even his running away from the spot after watching the accused giving some blows to the deceased, also raises doubt about the conduct of this witness. The explanation given to save himself by him is not acceptable. More so, the subsequent conduct of this witness, viz. instead of returning to the scene of offence and to inquire about the condition of the injured Khalid and thereafter to go to the house of Khalid for the purpose of informing his relatives, this witness straightaway goes to the witness Matin raises doubt about his presence at the scene of offence. His subsequent conduct to visit Matin to inquire about the condition of Matin is unnatural and not acceptable for the simple reason that he saw Matin standing outside the office of the deceased and that Matin was not at all assaulted by the accused and therefore, there was no question of inquiring about Matin having sustained any injury at the hands of the accused. Even though this witness refers to

the presence of one person in the office when the deceased was assaulted by the accused, surprisingly, he has not given the name of that person for the reason best known to him. Subsequently, the said person was declared to be Nasir and is brought as a witness, who in fact has not supported the prosecution. In his cross examination, he has admitted that the owner of the bakery was Bholabhai Dudhani, but he was not there and his man Bilal Janu was present. However, surprisingly, the prosecution has not examined said Bilal Janu. Thus, as far as the evidence of this witness is concerned, in our opinion, it does not get corroboration from any independent person. We feel that it would be unsafe to rely on the evidence of this witness.

Likewise, the evidence of Matin Majid Hadafa, PW-19/Exh.83 does not inspire any confidence. He has given almost similar version that the accused persons came in two cars and entered into the office where the deceased was writing account books which were lying on the writing desk. On reading this evidence, it is clear that he is also a highly interested witness and closely related to the deceased, who is his real uncle. His father was in custody in respect of the murder of Hajibhai Fulwala in an incident which took place on 21st March 1992. He claims to have remained present in the meeting held on 8th April 1992 of Bin Tablik to mourn the death of Haji Fulwala wherein accused nos.11 and 12 delivered provocative speech and thereby tried to create feelings of hatred against Tabliq Jamat sect. His presence there is quite unnatural when a crowd of more than 1000 was gathered of the opposite community where provocative speech was delivered. The claim of this witness that he remained present there is highly unnatural and contradicts his earlier statement. Not only that, his presence at the office of deceased at the time of the incident also appears to be unnatural. He is having his own xerox business in another area and he has admitted that after the arrest of his father, he has practically closed his business at the shop situated near the office where the incident in question had taken place. In that event, his attempt to establish his presence at the shop results into contradictions about his business and its closure for certain period. Even according to him, he was standing outside the office when the accused came in the cars and entered into the office. Applying the same reasoning, he could have been the probable target of the accused in view of the fact that he belongs to the opposite group and his father was also an accused and was in custody in respect of murder of Hajibhai Fulwala. Like the informant, he also runs away

when his uncle was assaulted and goes to his house and not informing any relatives. This conduct on the part of this witness seems to be quite unnatural and more particularly when he had not made any attempt to contact police for help. It is only after the informant contacted him, he decides to go to the Police Station for filing the complaint. Surprisingly, even though he was just standing at the entrance of the shop when the incident took place, his complaint is not recorded and he was made to sit outside the Police Station.

On careful consideration of the evidence, we find that he gave the names of five persons and though he was not knowing others by name, no Test Identification Parade is held and gathered the names of five persons from village and gave the same in his further police statement. Even though he knew accused nos.5 and 9 being servants at the place of accused nos.1 and 2, he did not give their description. Even though he has stated in his evidence that the deceased was writing account books which were lying on the writing desk when accused no.1 is alleged to have given blow and thereafter others surrounded and started giving blows, this version of this witness is not supported by situation at the scene of offence. Even PSI Dhilon in his evidence has stated that no writing desk, account book or pen were found from the scene of offence. Thus, the claim of this witness that the deceased was writing when the assault started is not borne-out. This makes the evidence of this witness untrustworthy. This witness clearly refers regarding the presence of Nasir in the office at the time of the incident. If Nasir was present at the time of the incident, this witness would have disclosed that to the complainant and the complainant could have taken the name of Nasir in the complaint. As stated above, the complainant instead of mentioning the name of Nasir, refers regarding the presence of one person only in the office at the time of the incident.

Thus, the above witnesses, in our opinion, are highly interested witnesses and their evidence does not inspire confidence and it would not be safe to rely upon their evidence to convict the appellants. Apart from that, no other eye witnesses have supported the prosecution. As stated above, no reliance can be placed on the inquest report, panchnama of scene of offence, panchnama with regard to the photographs of foot-print of the scene of offence, the panchnama of arrest of the accused as well as discovery of the knife of accused. There is also no investigation done with regard to the photographs of foot-print of the accused found from the

office of the deceased.

We have seen Panchnama, Exh.123; forwarding letter from FSL, Exh.125; forwarding letter from Chemical Analyser of FSL, Exh.126; Serological Report, Exh.127; Report from FSL, Exh.128; and Report from FSL about the investigation of finger print, Exh.129. On perusing the same, it appears that the bush-shirt and the knife purporting to have been recovered from accused no.2 stained with human blood - 'B' group. Similarly, the shirt and knife recovered from accused no.1 show presence of human blood - 'B' group and likewise, the knife recovered from accused no.3 is also stained with human blood - 'B' group. It is to be noted that the blood of the deceased taken at the post mortem is not of human blood group - 'B'. Thus, the report of the serology is also of no assistance to the prosecution.

Thus, taking the over-all view of the matter, we are of the opinion that except the so-called claim of the eye witnesses, there is no evidence which would connect the appellants with the commission of the offence. As stated above, the evidence of the eye witnesses, in the instant case, does not inspire confidence. Their presence at the scene of offence is quite unnatural and they appear to be chance witnesses. We strongly feel that the learned trial Judge has committed an error in convicting the appellants under Section 302 read with Section 114 of IPC. The reasoning recorded and the ultimate conclusion arrived at by the learned trial Judge in passing the order of conviction and sentence is not acceptable to us after appreciating the evidence on record.

7. In the result, the appeal is allowed. The judgment and order of conviction and sentence dated 29.3.1995 passed by the Addl.Sessions Judge, Gondal in Sessions Case No. 134 of 1992 for the offence under Sections 302 read with Section 149 of IPC is quashed and set aside. The appellants accused are ordered to be released forthwith, if they are not required in any other offence. D.S.

(Kshitij R. Vyas, J.)

(D.P. Buch, J.)
Sreeram.